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No. 230 --.

In the Supreme Court of the United States

OCTOBER TERM, 1957

MARVIN IRVING TAMARKIN, PETITIONER

v.

SELECTIVE SERVICE SYSTEM LOCAL DRAFT BOARD, #47, MIAMI, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A), is reported at 243 F. 2d 108. The order of the District Court appears at pp. 5-6 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered on March 29, 1957 (Pet. App. B). The petition for a writ of certiorari was filed on June 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner may enjoin his induction on the ground that the local board failed to grant him a second physical examination and a 21 day interval

before ordering him to report for induction, after the appeal board had continued his 1–A classification.

STATUTE AND REGULATIONS INVOLVED

Section 10 (b) (3) of the Universal Military Training and Service Act, 62 Stat. 620, 50 U. S. C. App. 460 (b) (3), provides in pertinent part:

> * * * The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * *

32 C. F. R. 1625.11 provides:

> *Classification considered anew when reopened.* When the local board reopens the registrant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be and have the effect of a new and original classification even though the registrant is again placed in the class that he was in before his classification was reopened.

32 C. F. R. 1625.12 provides:

> *Notice of action when classification considered anew.* When the local board reopens the registrant's classification, it shall, as soon as practicable after it has again classified the registrant, mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

32 C. F. R. 1625.13 provides:

> *Right of appeal following reopening of classification.* Each such classification shall be followed by the same right of appearance before the local board and the same right of appeal as in the case of an original classification.

32 C. F. R. 1625.14 provides:

> *Order to report for induction to be canceled when classification reopened.* When the local board has reopened the classification of a registrant, it shall cancel any Order to Report for Induction (SSS Form No. 252) which may have been issued to the registrant. If, after the registrant's classification is reopened, he is classified anew into a class available for service, he shall be ordered to report for induction in the usual manner.

32 C. F. R. 1628.10 provides:

> *Who will be examined.* Every registrant, before he is ordered to report for induction, or ordered to perform civilian work contributing to the maintenance of the national health, safety, or interest, shall be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination.

32 C. F. R. 1631.7 provides in pertinent part:

> *Action by local board upon receipt of notice of call.* (a) Each local board, upon receiving a Notice of Call on Local Board (SSS Form No. 201) from the State Director of Selective

Service for a specified number of men shall select and order to report for induction the number of men required to fill the call from among its registrants who have been classified in Class 1–A and Class 1–A–O and have been found acceptable for service in the armed forces and to whom the local board has mailed a Certificate of Acceptability (DD Form No. 62) at least 21 days before the date fixed for induction: * * *.

National Headquarters Selective Service System, Local Board Memorandum No. 28, issued Dec. 28, 1950, amended March 12, 1957, provides in pertinent part:

1. *Period of Validity Under Paragraph 18a, AR 601–270.*—Paragraph 18a of Section III of Army Regulations No. 601–270 provides in pertinent part as follows:

18. *Scope of induction processing.*—a. Selective Service registrants found acceptable for military service normally will be ordered to report to induction stations in not less than 21 and not more than 120 days after the preinduction examination. If the lapse of time between the preinduction examination and the appearance of the registrant for induction is more than 120 days, another complete physical examination is required to determine acceptability and immediate induction thereafter, except as provided in (1) * * * below—

* * * * *

2. *Action by Local Board.*—(a) Except in the cases of postponed registrants, the 120-day period of validity continues in effect for armed forces physical examinations. However, when

> a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be *immediately inducted.*

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Fifth Circuit, affirming the order of the United States District Court for the Southern District of Florida, denying his application for a preliminary injunction restraining his local board from ordering his induction into the armed forces.

Petitioner was classified 1–A, given a physical and mental examination, found acceptable for military service and so notified on May 21, 1954 (Pet. 6). Subsequently, he claimed exemption as a conscientious objector. The local draft board denied the claim and petitioner sought a review by the Appeal Board. On July 2, 1956, the Appeal Board again classified him 1–A. On July 6, 1956, petitioner was ordered to report for induction on July 23, 1956 (Pet. 6–7). On July 17, 1956, petitioner moved for a preliminary injunction to stay his induction on the ground that he was entitled to another pre-induction physical, and a 21 day waiting period before induction (R. 1–5).

ARGUMENT

1. Petitioner sought to enjoin an order for induction on the ground that he was entitled to a pre-induction physical and a 21 day waiting period from the date of acceptance after his final 1–A classification by the Appeal Board. His contention was wholly without merit since he was given a physical examination in May, 1954, and notified of his acceptance more than 21 days before July 23, 1956, the date fixed for his induction. Nowhere in the statute or the regulations is there a requirement that there be a physical examination and a 21 day waiting period each time a registrant's classification is considered by a selective service board. On the contrary, the memorandum issued by the National Headquarters Selective Service System (*supra*, pp. 4–5) provides that physical examinations shall be valid for 120 days, and that when more than 120 days has passed, as in this case, the registrant shall be ordered to report for induction at which time he shall be given a new physical examination.

2. In any event, as the court below held, petitioner could not challenge the order for his induction by way of injunction. As this Court said in *Witmer* v. *United States*, 348 U. S. 375, 377: "There is no direct judicial review of the actions of the Appeal Boards. Questions concerning the classification of the registrant may be raised either in a petition for habeas corpus or as a defense to prosecution for failure to submit to induction into the armed forces". See also *Reap* v. *James*, 232 F. 2d 507, 508 (C. A. 4); *Watkins* v. *Rupert*, 224 F. 2d 47 (C. A. 2); *United States* v.

Rumsa, 212 F. 2d 927, 937 (C. A. 7), certiorari denied, 348 U. S. 838; *Schwartz* v. *Strauss, et al.,* 114 F. Supp. 438 (S. D. N. Y.), affirmed, 206 F. 2d 767 (C. A. 2). These limited modes of review represent a balance which seeks to safeguard the registrant's constitutional rights, while precluding "* * * litigious interruption of the process of selection which Congress created". *Falbo* v. *United States,* 320 U. S. 549, 554; *Estep* v. *United States,* 327 U. S. 114; *Gibson* v. *United States,* 329 U. S. 338.[1]

An injunction would be particularly inappropriate in this case because petitioner did not exhaust his administrative remedies. Petitioner was given his pre-induction physical in May 1954 and ordered to report for induction on July 23, 1956. Since more than 120 days have elapsed from the date petitioner was given his pre-induction physical to the date he was to report for induction, another physical examination of petitioner would have been required when he reported for induction, pursuant to Army Regulation 601–270, paragraph 18a, Local Board Memorandum #28, issued December 28, 1950, amended March 12, 1957.[2]

[1] Even in *Townsend* v. *Zimmerman,* 237 F. 2d 376 (C. A. 6), on which petitioner relies and which the government believes contrary to the decisions of this Court, the court granted an injunction for the sole purpose of allowing the registrant to exhaust an administrative appeal which the court found had been denied to the registrant.

[2] Petitioner's contention that this procedure applies only if the registrant has been given a physical examination during his current classification (Pet. 13) is not the view of Selective Service, and certainly did not excuse petitioner from making himself available for the examination in order to exhaust his administrative remedies.

Thus, there was still a possibility that petitioner would be rejected for military service when he instituted his injunction action. And until a registrant has "* * * perform[ed] all requirements affording possibility of relief * * *", judicial review of a service classification even under allowable review procedures is foreclosed. *Gibson* v. *United States,* 329 U. S. 338, 350; *Falbo* v. *United States,* 320 U. S. 549. This rationale is even more applicable to injunctive relief since under these circumstances there can be no showing of irreparable injury. No such showing "* * * can be made so long as the registrant has not decided whether or not to obey the induction order and before the government has decided whether or not to prosecute if he decides not to report." *Watkins* v. *Rupert,* 224 F. 2d 47, 48 (C. A. 2).

The inappropriateness of injunctive relief is further demonstrated by the fact that a year has now passed since the date upon which petitioner was ordered to report for induction. If he did report on July 23, 1956, he would have been given the physical examination he seeks. If he did not, as appears to be the case, he is subject to criminal prosecution for his failure, and that is the proper forum in which to test any defense he might have. An "injunction" now would in fact be in the nature of a declaratory judgment as to his guilt or innocence in refusing to report for induction. A registrant has no right to avoid service to his country for a year while awaiting civil litigation of a claimed right to a waiting period of 21 days.

3. The issue is not one of general importance, nor is there any conflict. Petitioner, himself, states that

"Never before have facts similar to the instant case been placed before a judicial appellate tribunal for review; * * *" (Pet. 8). The case is not one requiring the attention of this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957